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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 687

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

E. W. THOMPSON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES AND BRIEF IN SUPPORT THEREOF.

RAY L. CHESEBRO,
FREDERICK VON SCHRADER,
JOHN L. BLAND,
BOURKE JONES,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 687

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

E. W. THOMPSON.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the People of the State of California for a writ of certiorari directed to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The case presents a question relative to a State regulatory statute affecting interstate commerce. In the Municipal Court of the City of Los Angeles, E. W. Thompson was found guilty of a misdemeanor by reason of his having

engaged in the business of a motor carrier transport agent without a license from the California Railroad Commission, as required by Section 3 of the California Statutes of 1933, Chap. 390, p. 1011 (R. 1, 7-8, 45). See page 19 for statute.)

The facts upon which the defendant Thompson was convicted are not in dispute and are very brief. In substance, they are: that Mr. Thompson conducted a business under the name of the Coast-to-Coast Travel Bureau, in the City of Los Angeles (R. 3). The owner of a private automobile who intended to make a trip to San Antonio, Texas, on business of his own, desired to take passengers with him to help defray part of the expense of the trip (R. 5). The defendant Thompson agreed to secure passengers for the owner of the automobile and the next day did secure four women passengers who desired to go to Dallas, Texas (R. 5, 6, 7). The owner of the car picked up the passengers and their luggage at the defendant's place of business, it being his intention to drive first to Dallas with his passengers and then to continue on to San Antonio (R. 6). The owner of the car was not in the business of transporting persons for hire and had never before transported any persons for compensation (R. 5-6).

The defendant had secured the four passengers through another person who apparently conducted a similar business, and who had booked the four persons for the trip and fixed the rate for the transportation (R. 6-7). The defendant sent a car to this other person's place of business to bring the passengers to his place of business (R. 7). The fare for each passenger was $11.00, and the defendant collected this sum from each of the passengers, turned over $7.00 to the owner of the car and retained $4.00 as his fee for securing the passengers, $3.00 of which he paid to the person who conducted the other travel bureau through which the passengers were secured; in all, the defendant collected

$44.00; paid $28.00 to the owner of the car; $12.00 to the person who sent him the business; and retained $4.00, or $1.00 per passenger, for himself (R. 7.).

Defendant's Contention.

The defendant contended that his activities constituted engaging in interstate commerce and that consequently he could not be required to obtain a license from the California Railroad Commission and post a bond as required by the statute (R. 41). The Municipal Court ruled on the contention adversely to the defendant and on the appeal by defendant of his conviction the Appellate Department of the Superior Court sustained the defendant's contention in this regard and reversed the judgment of the Municipal Court on the authority of the decision of this Honorable Court rendered in *Di Santo* v. *Pennsylvania* (1927), 273 U. S. 34, 71 L. Ed. 524 (R. 33-35).

B.

Basis of Jurisdiction of United States Supreme Court to Review the Judgment.

1. Statutory Provisions.

The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States to issue a writ of certiorari in this cause is Judicial Code, Section 237 (b) [28 U. S. C. A., § 344 (b)], the relevant portions of which are as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn

in question * * * the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

2. THE STATUTE OF THE STATE, THE VALIDITY OF WHICH IS INVOLVED.

The statute of the State, the validity of which as applied to the facts of the case was denied by the Appellate Department of the Superior Court, the highest court in the State having jurisdiction of the cause, is Chapter 390 of the Statutes of 1933, page 1011, as amended by Chapter 665, Statutes of 1935, page 1833, set forth in full commencing at page 19 (Appendix to this petition), the pertinent portions of which may be summarized as follows:

Title.

An Act to provide for the regulation, supervision and licensing of motor carrier transportation agents.

Legislative Declaration for the Necessity of the Act.

Public welfare requires the regulation and control of persons who hold themselves out to act as intermediaries between the public and intrastate motor carriers of passengers who are not required by law to obtain certificates of public convenience and necessity from the California Railroad Commission, and that as to interstate motor carriers public welfare requires the same regulation and control of such persons until such time as Congress shall act in the matter.

Definition—Application of the Act.

1. *Motor Carrier Transportation Agent.* One who sells or offers for sale or negotiates for transportation over the public highways of the State of California.

2. *Application.* The act has no application to transportation of persons without compensation or the transportation of farm workers or employees of nonprofit cooperative associations, and other instances having no relation to the issues presented in this cause.

The act specifically provides that it shall be applicable regardless of whether the transportation sold or offered to be sold is interstate or intrastate.

License Requirement.

It is unlawful to act in the capacity of a motor carrier transportation agent without first obtaining a license from the California Railroad Commission, the fee for which is $1.00 per year, and the application therefor shall be duly verified and be in such form and contain such information as the Railroad Commission may from time to time require, and the Railroad Commission shall not issue such a license if it determines that the applicant is not a fit and proper person to be licensed or the motor carriers for whom applicant proposes to sell transportation are not complying with the laws of the State or of the United States or the general orders of the California Railroad Commission applicable to the operations of said motor carriers. The license shall not be issued until a surety company bond in the sum of $1,000 has been filed by the applicant as principal, which bond shall be payable to the State of California, or to any person to whom the applicant shall have furnished or provided transportation, and shall be conditioned upon the faithful performance by the motor carrier for whom the

applicant is licensed to act of the contract or agreement of transportation negotiated by the licensee, and the honest and faithful performance by applicant of any undertaking as a licensed motor carrier transportation agent under the act.

There is also a provision for a blanket bond to be filed by corporations to cover the acts of persons acting as agents or employees of the corporation, the amount of said bond being fixed in the discretion of the Commission in a sum not in excess of $25,000.

Suspension or Revocation of License.

The Railroad Commission may suspend or revoke a license if it shall determine that the licensee is not a fit and proper person to hold the same or has engaged in false advertising and false representations in violation of the laws of the State of California, or any political subdivision thereof, or has sold or offered for sale or negotiated for sale transportation by any carrier that under the laws of the State of California is conducted in a manner contrary to the public interest or without proper authority or in violation of the provisions of this act, or the general orders, rules and regulations of the Railroad Commission pertaining thereto.

Records To Be Kept By Agents.

Motor carrier transportation agents are required to keep, for a period of two years, an exact and permanent record of all transactions had by them as such agents, including the amount paid to such agent by each person transported, point of destination, and name of the person, firm or corporation acting as motor carrier, which record shall at all times be open to inspection by any officer or agent of the state, county or city and county within the State.

Penalty for Operation Without License.

Fine of not to exceed $500, or by imprisonment in the county jail for a term not to exceed six months, or by both such fine and imprisonment, in the discretion of the court, or, if a corporation, by a fine not to exceed $2500; and for a second and subsequent offense a fine of not to exceed $1000, or imprisonment in the county jail or state prison for a term not to exceed one year, or both, or, if a corporation, a fine not to exceed $5000.

Penalties for Violation By Licensee.

Fine not to exceed $500, or by imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment, in the discretion of the court; and, in addition thereto, revocation of license by the California Railroad Commission.

3. Date of Judgment.

The final judgment of the Appellate Department of the Superior Court sought to be reviewed was rendered on October 15, 1940 (R. 35). Petitioner filed a petition for rehearing therein on October 22, 1940, which petition for rehearing was duly considered and denied by the court on October 24, 1940 (R. 40). Prior to the judgment of October 15, 1940, the court rendered judgment reversing the defendant's conviction (R. 18; Appendix, p. 31). However, petitioner filed a petition for rehearing (R. 20), which was granted and the earlier judgment vacated (R. 32).

4. Nature of the Case and Rulings of the Appellate Department of the Superior Court.

I.

Nature of the Case.

The case is a criminal prosecution for a misdemeanor arising out of the violation of a State statute, which was commenced by the filing of a complaint in the Municipal

Court of the City of Los Angeles charging the defendant with having engaged in the business and acted in the capacity of a motor transportation agent without having secured a license from the Railroad Commission of the State of California so to do (R. 1). When the defendant was arraigned on the complaint he pleaded not guilty to the charge (R. 44). No written plea was entered for the reason that under the practice of the State pleas are entered orally in criminal cases. (Cal. Penal Code, § 1017.) Upon the trial the evidence introduced by the people showed that the defendant operated a travel bureau and had sold transportation from Los Angeles, California, to Dallas, Texas, without having a license to act from the California Railroad Commission (R. 6-7). The defendant contended that he could not be found guilty under the facts disclosed by the evidence even though he did not have a permit so to do from the State Railroad Commission as he was engaged in interstate commerce and that the statute, if made applicable to the facts as disclosed on the trial, would be a burden upon interstate commerce and would therefore be void (R. 41). The Municipal Court declined to uphold defendant in this contention and found him guilty of the offense charged (R. 45). The defendant thereupon took an appeal of his conviction to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles (R. 2), which, under the constitution and laws of the State of California, is the court of last resort for the review of judgments of the Municipal Court of the City of Los Angeles. (See cases cited at p. 10 of this petition.)

II.

Rulings of the Appellate Department of the Superior Court.

In reversing the judgment of conviction of the defendant entered in the Municipal Court, the Appellate Department

of the Superior Court stated in its memorandum opinion (attached hereto), commencing at page 27:

1. "That whoever agrees to transport a person from California to Texas, for compensation, has undertaken to engage in interstate commerce, even though he has never been so engaged before and may never be so engaged again," and that "the contract made with the complaining witness, therefore, was in the field of interstate commerce."

2. That the State of California cannot by statute require a license and bond of a motor carrier transportation agent when the tickets he sells are on behalf of one who carries persons for hire in interstate commerce, even though Congress has not as yet undertaken to enact legislation affecting such matter.

3. That the case of *Di Santo* v. *Pennsylvania* (1927), 273 U. S. 34, 71 L. Ed. 524, controls in this matter and requires that the judgment of conviction be reversed on the ground that under the *Di Santo* case the particular burden involved in the case at bar has been adjudged to be one that a state may not impose on interstate or foreign commerce.

5. Cases Believed to Sustain the Jurisdiction of the Supreme Court of the United States.

I.

The Judgment Is Final.

1. The existence of jurisdiction is to be tested by the substantial operation of the judgment.

United States v. *Thompson*, 251 U. S. 407, 412, 64 L. Ed. 333, 341.

2. The judgment finally determines that the defendant is not required to comply with the statute of the State in sell-

ing transportation from California to points outside the State.

United States v. *Oppenheimer*, 242 U. S. 85, 88, 61 L. Ed. 161, 164.

3. A judgment of dismissal which conclusively determines the rights of the petitioner is final.

City of Waco v. *United States Fidelity & Guaranty Co.*, 293 U. S. 140, 143, 79 L. Ed. 244;

United States v. *Three Friends*, 166 U. S. 1, 49, 41 L. Ed. 897, 913.

4. The fact that there might be some further proceedings upon an entirely collateral or independent matter does not detract from the finality of the judgment.

Knox National Farm Loan Assn. v. *Phillips*, 300 U. S. 194, 197, 81 L. Ed. 599, 602;

Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8, 16, 76 L. Ed. 136, 142;

Mt. Vernon-Woodberry Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U. S. 30, 31, 60 L. Ed. 507, 510.

II.

The Appellate Department of the Superior Court Is One of Last Resort.

Kim Young v. *California* (*Schneider* v. *State, Town of Irvington*), 308 U. S. 147, 154, 84 L. Ed. 155, 161;

Carlson v. *California*, 310 U. S. 106, 111, 84 L. Ed. 1104, 1107;

People v. *Reed* (1936), 13 Cal. App. (2d) 39, 40.

III.

The Writ of Certiorari Will Issue upon the Petition of a State or Its Agencies Where the Claim of Invalidity of the State Statute Is Based upon Conflict with Authority Vested in the Federal Government and Such Claim Is Sustained by the State Court.

State Tax Commission v. *Van Cott*, 306 U. S. 511, 513, 83 L. Ed. 950, 952;
Virginia v. *Imperial Coal Sales Co.*, 293 U. S. 15, 16, 17, 79 L. Ed. 171, 173;
Minnesota v. *Blasius*, 290 U. S. 1, 5, 78 L. Ed. 131, 133;
McGoldrick v. *Berwind-White Etc. Co.*, 309 U. S. 33, 84 L. Ed. 565.

IV.

The Judgment of the Court Was Based upon an Asserted Conflict of the State Statute with a Power Vested in the Federal Government.

State Tax Commission v. *Van Cott* (*supra*), 306 U. S. 511, 514, 83 L. Ed. 950, 952.

V.

Section 237 of the Judicial Code Makes No Distinction between Civil and Criminal Cases in Respect to the Revision of the Judgments of State Courts by the Supreme Court of the United States.

Twitchell v. *Commonwealth of Pennsylvania*, 74 U. S. 321, 324, 19 L. Ed. 223.

6. GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

I.

If this Honorable Court is unable to say that every question is foreclosed by prior decisions and clearly not debatable, it cannot be said that no question of substance is presented.

Chesebro v. *Los Angeles County Flood Control District*, 306 U. S. 459, 463, 83 L. Ed. 921, 925;

Hamilton v. *University of California*, 293 U. S. 245, 258, 79 L. Ed. 343, 350.

II.

Until Congress, under the commerce power, adopts legislation inconsistent with it, a State statute in the nature of a police regulation requiring a broker whose business has a local situs within the State, though he deals in matters of interstate commerce, to secure a license upon an application showing his character, responsibility and good faith in conducting such business, and requiring a bond to be posted, conditioned upon the honest conduct of his business, is a valid State statute, as whatever effect as the regulation has upon interstate commerce is indirect and incidental.

Hartford Accident & Indemnity Co. v. *Illinois*, 298 U. S. 155, 158, 80 L. Ed. 1099, 1102.

III.

A State regulatory statute is not void as imposing a burden upon interstate commerce where the burden imposed is an inseparable incident of the exercise of legislative authority which, under the Federal Constitution, has been left to the States.

Ziffrin v. *Reeves*, 308 U. S. 132, 141, 84 L. Ed. 128, 136.

IV.

In the absence of the exercise of Federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests, even though interstate commerce is directly affected.

Eichholz v. *Public Service Commission,* 306 U. S. 268, 274, 83 L. Ed. 641, 646;

Kelly v. *Washington,* 302 U. S. 1, 10, 82 L. Ed. 3, 10.

V.

Congress, in enacting the Federal Motor Carrier Act of 1935, did not intend to supersede State police regulations established for the protection of the public.

H. P. Welch Co. v. *New Hampshire,* 306 U. S. 79, 85, 83 L. Ed. 500, 505;

Maurer v. *Hamilton,* 309 U. S. 598, 614, 84 L. Ed. 969, 980;

See, also:

South Carolina State Highway Department v. *Barnwell Bros.,* 303 U. S. 177, 189, 82 L. Ed. 734, 741.

VI.

In the absence of Federal legislation covering the subject, the State may impose, even upon vehicles using the highways exclusively in interstate commerce, nondiscriminatory regulations for the purpose of insuring the public safety and convenience.

Sprout v. *South Bend,* 277 U. S. 163, 169, 72 L. Ed. 833, 836;

Bradley v. *Public Utilities Com.,* 289 U. S. 92, 95, 77 L. Ed. 1053, 1056.

VII.

The transportation sold by persons in the business in which the respondent Thompson was engaged is accom-

plished by drivers of automobiles who are operating independently and who often have no financial responsibility, and the only effective way of assuring the performance of their contracts is through control of the licensed agents, and the statute enacted to meet the known conditions prevailing on the highways of California at the present time is a valid exercise of the police powers of the State.

Finn v. *Railroad Commission* (Three-Judge Statutory Court), 2 Fed. Supp. 891, 894.

VIII.

Statutes of the type involved in this case have been held by State courts to only incidentally affect interstate commerce and that since they are well within the reasonable exercise of the police power of the State they are valid.

Bowen v. *Hannah*, 167 Tenn. 451, 463, 71 S. W. (2d) 672, 676;

Francis v. *Allen*, 54 Ariz. 377, 386, 96 Pac. (2d) 277, 281;

Martin v. *Railroad Com.* (Tex. Civ. App.), 93 S. W. (2d) 1155, 1159.

7. Stage In Proceedings and Method of Raising Federal Questions.

At the close of the evidence on the trial of the action in the Municipal Court the defendant urged, by way of argument as reason for the rendition of a judgment of not guilty, that the statute which he was charged with violating was, as applied to him, unconstitutional and therefore void, for the reason (1) that it constituted a burden upon interstate commerce, in violation of the Constitution of the United States, and (2) that Congress had enacted a law governing and regulating the operation of motor carriers engaged in interstate commerce and that therefore the State of California was without power to enforce the statute which he was charged with having violated (R. 41).

After the defendant was found guilty and judgment entered accordingly, he appealed to the Appellate Department of the Superior Court (R. 2) and, in substance, urged in his points and authorities as ground for reversal of his judgment of conviction in the Municipal Court that the states have no power to pass laws regulating commerce among themselves as under Article I, Section 7, of the Constitution of the United States that power is vested exclusively in Congress and that the requirement of the State statute, that before a person is authorized to sell interstate transportation tickets or transportation he must secure a license from the State Railroad Commission and post a bond and otherwise submit generally to State regulations, is unconstitutional and void as it invades the exclusive field of Congress (R. 10-13).

C.

The Questions Presented.

I.

Where Congress has not as yet enacted legislation upon the subject, is a State prohibited from enacting a police regulatory statute for the supervision and control of those engaged in acting as intermediaries in arranging for and selling transportation from points within the State to destinations outside the State by means of motor carriers not subject to the authority of the Interstate Commerce Commission or other Federal agency?

II.

Is an unconstitutional burden placed upon interstate commerce by compelling compliance with a state statute which requires those who sell transportation by means of casual motor carriers not subject to the authority of the Interstate Commerce Commission or other Federal agency to secure

a license so to do from the State by making application therefor, showing their fitness to conduct such a business, and filing a bond conditioned upon the faithful performance of the contract of carriage by such licensees and the carriers who undertake the transportation?

D.

The Reasons Relied On for the Allowance of the Writ.

I.

The Appellate Department of the Superior Court decided a Federal question of substance not heretofore determined by this Honorable Court and has decided the question in a way which is probably not in accord with the applicable decisions of this Court.

II.

The question decided by the Appellate Department of the Superior Court is one of utmost importance to every State and to the Federal Government as well, as it involves the authority of the States to regulate and supervise a business which is fraught with great evil unless it is regulated and controlled so as to exclude irresponsible persons from engaging therein.

III.

In order to adequately protect the public against prevalent evils which have arisen from the unregulated conduct of so-called travel bureaus, transportation agents and the like, the proprietors of which arrange and sell tickets for transportation by casual or private motor vehicles between points in different States, it is highly necessary that this Honorable Court eliminate the confusion existing in the decisions of various State courts upon the question of the power of the several States to enact legislation upon this

matter, in view of the authority vested in Congress under the Constitution of the United States over matters of commerce between the States.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket, Superior Court No. Cr. A. 1692, Trial Court No. 93,602, "People of the State of California, plaintiff and respondent, vs. E. W. Thompson, defendant and appellant"; and that the said judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

PEOPLE OF THE STATE OF CALIFORNIA,
By RAY L. CHESEBRO,
FREDERICK VON SCHRADER,
JOHN L. BLAND,
BOURKE JONES,
Counsel for Petitioner.

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APPENDIX.

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State Statute Involved.

California Statutes of 1933, p. 1011, as amended by Statutes of 1935, p. 1833; Deering's General Laws, Act No. 5130c.

"An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof; and repealing an act entitled 'An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof,' approved June 5, 1931, and all acts or parts of acts inconsistent with the provisions of this act.

"Sec. 1. The Legislature hereby declares that the public welfare requires the regulation and control of those persons, whether acting individually or as officers, commission agents or employees of any person, firm or corporation, who hold themselves out to act as intermediaries between the public and those motor carriers of passengers operating, as common carriers or otherwise, over the public highways of the State, for compensation, that are not required by law to obtain, or that have not obtained, a certificate from the Railroad Commission of the State of California declaring that public convenience and necessity require the operations of such motor carriers; further, that until such time as Congress of the United States shall act, the public welfare requires such regulation and control of such intermediaries between the public and interstate motor carriers as well as between the public and intrastate motor carriers.

"Sec. 2. A motor carrier transportation agent within the meaning of this act is a person who, acting either individually or as an officer, commission agent, or employee of a corporation, or as a member of a copartnership, or as a commission agent or employee of another person or persons, sells or offers for sale, or negotiates for or holds himself out as one who sells, furnishes or provides, transportation over the public highways of this State when such

transportation is furnished, or offered or proposed to be furnished, by a motor carrier as defined in this act.

"A motor carrier within the meaning of this act is any person, firm, or corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, transporting, or offering or proposing to transport, as a common carrier or otherwise, persons for compensation over the public highways of the State of California, or any portion thereof.

"*Application of act.* This act shall not apply to the carriage, or proposed carriage, of any person, or persons, when no compensation for such carriage is paid, or offered or proposed to be paid, or requested or required to be paid, by, or on behalf of, a person, or persons, transported, or to be transported; nor to those engaged solely in the carriage or transportation to and from work, of employees engaged in farm work on any farm of the State of California, nor to those engaged solely in the carriage or transportation to and from work of employees of any nonprofit cooperative association organized pursuant to any of the laws of the State of California; nor to movements of persons wholly within the corporate limits of a single municipality; nor to transportation over a route wholly or partly within a National park where such transportation is sold in conjunction with or as part of a rail trip; provided, however, that the transportation of persons whereby there is paid, or requested or required to be paid, by, or on behalf of, the person, or persons, transported, a portion of the expense incurred in course of such transportation, shall be deemed transportation provided by a motor carrier within the meaning of this act.

"The provisions of this act shall apply regardless of whether such transportation so sold, or offered to be sold, is interstate or intrastate. (Amended by Stats. 1935, p. 1834.)

"Sec. 3. From and after sixty (60) days after this act becomes effective, it shall be unlawful for any person, firm or corporation to engage in the business, or act in the capacity, of a motor carrier transportation agent within the meaning of this act without first obtaining a license therefore.

No license shall be issued to any copartnership or corporation, it being the intent hereof to require each person acting as a motor carrier transportation agent, in this State, to be individually licensed therefor; provided, however, that if an applicant is an officer or commission agent or employee of a corporation, or a member of any copartnership, or a commission agent or employee of any person or copartnership, he shall so state in his application, and the corporation, copartnership, or person of which applicant is an officer, member, or employee, as the case may be, shall join in applicant's application and shall set forth therein the relationship between applicant and said person, copartnership and/or corporation so joining.

"Sec. 4. The Railroad Commission of the State of California is hereby vested with authority to administer this act, with full power to regulate and control the issuance and revocation of licenses to be issued under the provisions of this act, and to perform all other acts and duties provided in this act and necessary for its enforcement.

"Sec. 5. All fees charged and collected under this act shall be deposited at least once a month in the State treasury to the credit of the Railroad Commission and in augmentation of the current appropriation for the support of the Railroad Commission and may be expended by the Railroad Commission for the administration of this act.

"Sec. 6. An application for a license as a motor carrier transportation agent shall be made in writing to the Railroad Commission, which application shall be duly verified and shall be in such form and contain such information as the Commission may from time to time require.

"The Railroad Commission shall have power, with or without hearing, to issue said license as prayed for, or to refuse to issue the same, or to issue it for the partial exercise of the privilege sought. No license shall be issued to an applicant when, with or without hearing, the Railroad Commission shall determine that (1) the applicant is not a fit and proper person to receive the same, or (2) the motor carriers for whom applicant proposes to sell transportation

have not complied, and are not then and there complying and do not propose to comply, with State and/or Federal Laws, and/or all general orders of the Railroad Commission of the State of California, applicable to the operations of said motor carrier.

"The order of the Railroad Commission granting to any applicant a motor carrier transportation agent's license shall set out the name of the motor carriers for whom said agent is licensed to sell.

"*Display of license.* In the location at which applicant is licensed to sell transportation, there shall be displayed in a prominent place a certificate setting forth the name of the licensee and such other matter and things as the commission may require.

"Sec. 7. The fees for licenses, and each renewal thereof, shall be one dollar ($1) per year, or fraction thereof. All applications for licenses shall be accompanied by the fee as herein provided and all licenses, subject to the provisions for renewal, which the Railroad Commission shall prescribe, shall expire on December 31 of each year. (Amended by Stats. 1935, p. 1834.)

"Sec. 8. No license shall be issued unless the applicant therefor shall provide a good and sufficient bond in the sum of one thousand dollars ($1000), which bond shall be filed by such applicant as principal and by some solvent surety company, authorized to do business in the State of California, as surety, payable to the State of California, and/or any person, or persons, for, or to whom, applicant may, or shall, furnish or provide transportation, and shall be conditioned: (1) upon the faithful performance, by the motor carrier or motor carriers for whom applicant is licensed to act, of the contract or agreement of transportation negotiated by the licensee, and (2) the honest and faithful performance by applicant of any undertaking as a licensed motor carrier transportation agent under this act; provided, however, that if any corporation, copartnership, or person of which applicant is an officer, member, commission agent or employee, as the case may be, shall join in applicant's application as provided in section 3 hereof, applicant

shall be deemed to have complied with the provisions of this section if applicant shall provide, or there shall, theretofore, have been filed with the Railroad Commission, a good and sufficient bond in a sum to be fixed by the Railroad Commission, not exceeding twenty-five thousand dollars ($25,000), executed by the corporation, copartnership, or person, joining in such application, as principal, and by some solvent surety company, authorized to do business in the State of California, as surety, payable to the State of California, and/or any person, or persons, for , or to whom, any officer, member, commission agent or employee of said principal, licensed under the provisions of this act may, or shall, furnish or provide transportation, conditioned: (1) upon the faithful performance, by the motor carrier or motor carriers for whom any officer, member, commission agent, or employee of said principal is licensed to act, of the contract or agreement of transportation negotiated by the licensee, and (2) the honest and faithful performance, by any such officer, member, commission agent or employee so licensed, of any undertaking as a licensed motor carrier transportation agent under this act.

"Sec. 9. No license issued under the provisions of this act shall give authority, to do any act for which the license is issued, to any person, other than the licensee, and such license shall not be transferable or assignable. No license issued thereunder shall authorize the licensee to do business except in the location stipulated in the license.

"Sec. 10. The commission may suspend or revoke any license theretofore issued if it shall determine that the licensee is not a fit and proper person to hold the same, or if the commission shall determine that the licensee, in acting as such motor carrier transportation agent, has engaged in false advertising and false representation in violation of the laws of this State, or any political subdivision thereof, or has sold, offered for sale, or negotiated for sale, transportation by any carrier that under the laws of this State is conducted in a manner contrary to the public interest, or without proper authority, or in violation of the provisions of this act or the general orders, rules and regulations of the Railroad Commission pertaining thereto.

"Sec. 11. It shall be the duty of all motor carrier transportation agents to maintain and keep, for a period of two (2) years, an exact and permanent record of all transactions had by them as such agents, including the amount paid to such agent by each person transported, point of destination, and the name of the person, firm or corporation acting as motor carrier. The records hereby required to be kept shall at all times be open to inspection by any officer or agent of the State, county, or city and county within the State.

"Sec. 12. All powers heretofore, or hereafter to be vested in the Railroad Commission of the State of California, as relates to hearing and determining matters presented to it, are made applicable to the proceedings under the provisions of this act.

"Sec. 13. This act shall not have the effect to release or waive any right of action by the State, Railroad Commission, or any person or corporation, for any fine, penalty or forfeits which may have arisen or accrued, or may hereafter arise or accrue, under any laws of this State. All penalties accruing under this act shall be cumulative of each other, and a suit for the recovery of one penalty shall not be a bar to, or affect the recovery of, any other penalty or forfeit, or be a bar to any criminal prosecution, or be a bar to the exercise of the commission of its powers to punish for contempt.

"Sec. 14. Any person, firm or corporation, shall be understood to be acting as a motor carrier transportation agent within the meaning of this act who shall (1) orally or by card, circular, pamphlet, newspaper, radio, sign, billboard, or any other way, advertise himself, or itself as one who sells, furnishes, negotiates for, or provides transportation over the public highways of this State when such transportation is furnished or offered, or proposed to be furnished, by motor carriers as defined in this act; (2) manage or conduct as manager, conductor, agent, proprietor, leasor, lessee, ticket collector, or otherwise, a place where transportation is, or is offered, or proposed to be, sold, furnished, negotiated for, or provided by a motor carrier as defined in this act; (3) aid and abet, or without being pres-

ent shall have advised and encouraged any person, firm or corporation in acting as, or to act as, a motor carrier transportation agent. One act of the nature herein set forth shall constitute a person, firm or corporation doing or committing such act, a motor carrier transportation agent within the meaning of this act. It is hereby made the duty of any officer arresting any person for violation of this act, to take, and keep in his custody for use as evidence, any materials or indicia used by said person so arrested, for the purpose of advertising said persons acting as, or desiring to act as, a motor carrier transportation agent.

"*Burden of proof.* Any person who may, or shall, be charged with, or complained of as, acting as a motor carrier transportation agent without a license as herein provided, shall bear the burden of proof of proving as a matter peculiarly within the knowledge of the person so charged or complained of: (1) that such person, firm or corporation so charged or complained of is a licensed motor carrier transportation agent; and (2) that the motor carrier or motor carriers for whom such person, firm or corporation is, or has been, acting, or proposed to act, as an agent, as charged or complained of, is not a motor carrier within the meaning of this act.

"Sec. 15. The Railroad Commission may prefer a complaint for violation of this act before any court of competent jurisdiction and said commission and its counsel, or other official representatives, may assist in presenting facts at the trial. It shall be the duty of the district attorney of each county in this State to prosecute all violations of the provisions of this act in their respective counties in which such violations occur, either with or without request of said commission.

"'Sec. 16. Any person, firm or corporation, acting as a motor carrier transportation agent within the meaning of this act without a license as herein provided shall, upon conviction of a first offense thereof, if a person, be punished by a fine of not to exceed five hundred dollars ($500), or by imprisonment in the county jail for a term not to exceed six months, or by both such fine and imprisonment, in the dis-

cretion of the court; or, if a corporation, may be punished by a fine of not to exceed two thousand five hundred dollars ($2,500); and for a second and subsequent offense shall, upon the conviction thereof, if a person, be punished by a fine of not to exceed one thousand dollars ($1,000), or by imprisonment in the county jail or State prison for a term not to exceed one year, or by both such fine and imprisonment in the discretion of the court; or, if a corporation, may be punished by a fine of not to exceed five thousand dollars ($5,000).

"Sec. 17. Any person duly licensed as a motor carrier transportation agent, who shall violate any of the provisions of this act shall, upon conviction thereof, be punished by a fine not to exceed five hundred dollars ($500), or by imprisonment in a county jail not to exceed six months, or by both such fine and imprisonment in the discretion of the court; and in addition thereto, the license as motor carrier transportation agent theretofore issued shall be revoked by the Railroad Commission in the manner herein provided.

"Sec. 18. The term 'commission,' or 'Railroad Commission,' when used in this act, means the Railroad Commission of the State of California.

Same as Sec. 21, post.

"Sec. 19. If any section, subsection, sentence, clause or phrase of this act is, for any reason, held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause, and phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional.

"Sec. 20. Chapter 638, Statutes of 1931, entitled 'An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof,' approved June 5, 1931, is hereby repealed.

"Sec. 21. The term 'commission' or 'Railroad Commission' when used in this act means Railroad Commission of the State of California."

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Superior Court No. CR A 1692.

Trial Court No. 93602.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

E. W. THOMPSON, Defendant and Appellant.

MEMORANDUM OPINION ON REHEARING.

Appeal by defendant from a judgment and an order made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge. Reversed.

The complaining witness paid for what she believed to be, and so far as we are aware proved to be, transportation from Los Angeles to Dallas, Texas. No one so far has questioned what seems to us to be an obvious conclusion, that whoever agrees to transport a person from California to Texas, for compensation, has undertaken to engage in interstate commerce, even though he has never been so engaged before and may never be so engaged again. The contract made with the complaining witness, therefore, was in the field of interstate commerce.

Who was it that undertook to transport the complaining witness (and three others) to Texas? In an endeavor to distinguish the case under review from *Di Santo* v. *Pennsylvania* (1927) 273 U. S. 34, 71 L. ed. 524, counsel for the People picture our case as one where the defendant

"secures orders * * * upon his own account * * * he is an independent contractor." The evidence supports this conclusion, i. e., that the defendant as principal undertook to transport the complaining witness to Texas. If so, the defendant would appear as the motor carrier and not as a motor carrier transportation agent, and the judgment of conviction would have to be reversed on that ground. The evidence, however, also supports the conclusion, doubtless reached by the trial judge, that the owner and driver of the automobile was the motor carrier, the principal in the transaction, and that the defendant acted as his agent in securing passengers and in collecting compensation for the passage. On this view of the evidence, the defendant was proven guilty of the charge brought against him, for admittedly he did not have the license required by the act.

Can the act (Act 5130c, Deering's Gen'l Laws) validly do that which it has expressly attempted to do until federal action takes the field, i. e., require a license and bond of a motor carrier transportation agent when the tickets he sells are on behalf of one who carries persons for hire in interstate commerce? In answering this question we are gently admonished by counsel to follow cases which are in point rather than those which involve facts far afield. So it is that we follow *Di Santo* v. *Pennsylvania*, referred to above, rather than *Hartford &c Co.* v. *People* (1936) 298 U. S. 155, 80 L. ed. 1099; *Milk Control Board* v. *Eisenberg Farm Products* (1939) 306 U. S. 346, 83 L. ed. 752; *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940) 84 L. ed. Adv. Op. 343; *Maurer* v. *Hamilton* (1940) 84 L. ed. Adv. Op. 671, each of which deals with a statute affecting interstate commerce at points quite removed from that where our statute presses. The Di Santo case, however, is much in point. There an individual had been convicted of acting as ticket agent without the license and bond required of one selling tickets on behalf of steamship companies. The license and bond were not required of those actually furnishing the transportation, nor of their officers or employees, nor were they parties to the action. The judgment of conviction was reversed, however, because, the federal supreme court held, (1) to require a license and bond of one who was the ticket agent of a company engaged in for-

eign commerce was to place a burden on foreign commerce which a state may not impose, and (implicit in the decision), (2) of the statute's invalidity the ticket agent may complain.

It may well be that the next time this question is presented to the supreme court a different answer will be given. It is within their power, not ours, to reverse their decisions. It may be that they would differentiate our statute from that involved in the Di Santo case because the latter dealt with foreign commerce, while our statute deals with interstate commerce. We find in the words granting power to the Congress, "To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes" (Art. I, sec. 8, U. S. Const.) no recognition of a greater immunity from state legislation affecting foreign commerce than that affecting interstate commerce. We recognize that many state-imposed burdens on and many state-created conflicts with interstate commerce have been permitted. But the particular burden involved here has been adjudged one that a state may not impose. We feel bound by the supreme court's determination of the question.

Because the complaint is defective in not alleging the acts claimed to have been done by the defendant except by an inaccurate and hence futile use of a term that has no significance aside from the statute's definition, we are ordering the dismissal of the action. If, as may be, the People are in a position to prove that the defendant acted as ticket agent for motor carriers doing an intrastate business, the dismissal may be made for the purpose of filing an amended complaint.

The judgment and the order appealed from are reversed, and the cause is remanded to the Municipal Court with directions to dismiss the complaint.

Dated October 15, 1940.

BISHOP,
Judge.

We concur:
SHAW,
Presiding Judge,
SCHAUER,
Judge.

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IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

(This Opinion Vacated.)

Superior Court No. CR A 1692.

Trial Court No. 93602.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

E. W. THOMPSON, Defendant and Appellant.

MEMORANDUM OPINION.

Appeal by defendant from a judgment and an order made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge. Reversed with directions.

Two conclusions are inescapable. In the first place the evidence supports the conviction; appellant did violate the terms of the statute (Act 5130c, Deering's Gen'l Laws 1937) that prohibits an unlicensed person from acting in the capacity of a motor carrier transportation agent. He sold transportation over the highways of this state, which a Mr. McClure had offered to furnish. He (the defendant) thus acted in the capacity of a motor carrier transportation agent under sections 2 and 14 of the act, if Mr. McClure

was a motor carrier. That Mr. McClure was a motor carrier, within the definition of that term in section 2 of the act, follows from the unadorned fact that he offered to transport persons for compensation over the highways of this state.

It also appears, however, that the only transportation Mr. McClure offered to furnish, and the only transportation the defendant sold, within the confines of this case, was from Los Angeles, California, to Dallas, Texas. The requirement of the act (sections 3 and 8) that no one may act as agent in selling transportation without securing a license, to obtain which a one thousand dollar bond must be provided, in so far as it is attempted to be applied to a purely interstate operation such as that involved here, is a direct not merely incidental burden on interstate commerce, beyond the power of a state to impose. The case of *Motor Transit Co. v. Railroad Commission of California* (1936) 15 Fed. Supp. 630, so held with respect to the statute we are considering, and as pointed out by Judge Wilbur (p. 633), "The decision of the Supreme Court in *Di Santo* v. *Commonwealth of Pennsylvania*, 273 U. S. 34, 47 S. Ct. 267, 71 L. Ed. 524, is decisive upon that question."

Because the complaint is defective in not alleging the acts claimed to have been done by the defendant except by an inaccurate and hence futile use of a term that has no significance aside from the statute's definition, we are ordering the dismissal of the action.

The judgment and the order appealed from are reversed, and the cause is remanded to the Municipal Court with directions to dismiss the complaint.

Dated June 4, 1940.

BISHOP,
Judge.

I concur.

SCHAUER,
Judge.

I concur. This case is distinguishable from that involved in *Wintjen* v. *City of L. A.*, L. A. Superior Court No. 447423. There, according to the complaint considered, the plaintiff

sold no tickets or transportation and collected no money in payment for transportation, but merely conducted a sort of information bureau where those desiring transportation and those willing to furnish it might be brought together so that they could make their own arrangements. It was held that such a business did not so directly affect interstate commerce as to remove it from the power of the state unless Congress should act upon it. To that decision I still adhere. See *Hartford Acc. etc. Co.* v. *Illinois* (1936), 298 U. S. 155, 80 L. Ed. 1099. In this case, however, the defendant directly sold the transportation to those desiring it and collected the price thereof. While he did not issue anything denominated "tickets," he did give the prospective passengers receipts which served the same purpose and were taken up by him when transportation began. I can see no way to escape the application of the authorities cited in the foregoing opinion to such a case. But the statute is not thereby rendered invalid as a whole. It may still operate on intra-state transportation and in cases which are like the Wintjen case in their facts.

SHAW,
Presiding Judge.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 687

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

E. W. THOMPSON.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petitioner respectfully presents this brief in support of its petition for a writ of certiorari directed to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, to review the judgment of that court rendered in the case entitled, "People of the State of California *v.* E. W. Thompson".

Opinions of the Court Below.

In rendering its first judgment reversing the conviction of respondent E. W. Thompson, the Appellate Department of the Superior Court delivered a Memorandum Opinion (R. 18). After granting petitioner's petition for rehearing (R. 32) the court again rendered a judgment of reversal and delivered a Memorandum Opinion on Rehearing (R. 33). Neither of these Memorandum Opinions will be published in any official reporting service; however, they will be kept on file in the office of the Clerk of the Court and

will be cited in subsequent cases if the questions of law to which they relate again come before the court.

Grounds of Jurisdiction.

The jurisdiction of this Honorable Court is invoked under Section 237 (b) of the Judicial Code [28 U. S. C. A., § 344 (b)]. The date of the judgment which petitioner seeks to have reviewed is October 15, 1940 (R. 35). Thereafter, and within the time allowed by the Rules of Court governing petitions for rehearing in the Appellate Department of Superior Courts, petitioner filed a petition for rehearing (R. 35), which petition was duly considered and denied by the court on October 24, 1940 (R. 40).

Statement of the Case.

Respondent E. W. Thompson, the appellant in the court below, was charged, in the Municipal Court of the City of Los Angeles, with the commission of a misdemeanor in that he acted as a motor carrier transportation agent without first having obtained a license so to do from the California Railroad Commission, and that his act in so doing was in violation of Section 3 of the California Statutes of 1933, page 1011 (R. 1). The statute is set forth in full commencing at pag 19 (Appendix to the Petition) and is summarized commencing at page 4 of the petition itself. A complete statement of the case has been made in the petition in the summary statement of the matter involved (p. 1), and the statement of the nature of the case (p. 7). Therefore, in the interest of brevity, the facts of the case will not be repeated here, other than to state that the issue involved is whether the States, in the absence of legislation by Congress upon the subject, have power to control, by statutes of a police regulatory nature, persons engaged in the business of selling transportation to be furnished by unlicensed,

casual motor vehicle operators, where such transportation is to a destination outside the State.

Specifications of Error.

The court below erred in holding:

1. That the State of California, cannot, by statute, require a license and bond of a motor carrier transportation agent when the tickets he sells are on behalf of one who, as an unlicensed and casual carrier, transports persons for hire by private passenger vehicle to destinations beyond the State, even though Congress has not as yet undertaken to enact legislation affecting such matter.

That the case of *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 71 L. Ed. 524, holds that the States are without the power to enact legislation upon this subject and is applicable to the facts of this case and requires that the judgment of conviction of the defendant be reversed.

ARGUMENT.

Summary of the Argument.

POINT I.

IN ORDER TO PROTECT THE PUBLIC SAFETY AND WELFARE AND PREVENT FRAUD UPON THE PUBLIC, IT IS ESSENTIAL THAT THE BUSINESS OF ACTING AS AGENT OR BROKER FOR THE SALE OF TRANSPORTATION OF PERSONS BY MEANS OF PRIVATE PASSENGER MOTOR VEHICLES OPERATED CASUALLY BY UNLICENSED PERSONS BE REGULATED UNDER THE EXERCISE OF THE POLICE POWER.

POINT II.

THE DECISION OF THE COURT BELOW, HOLDING THAT EVEN IN THE ABSENCE OF LEGISLATION BY CONGRESS UPON THE SUBJECT THE STATES ARE WITHOUT POWER TO REGULATE MOTOR CARRIER AGENTS OR BROKERS IN SO FAR AS THEIR ACTS RELATE TO SELLING OR ARRANGING FOR TRANSPORTATION TO DESTINATIONS BEYOND THE STATE, IS

IN CONFLICT WITH DECISIONS OF THIS COURT APPLICABLE TO THE REGULATION OF TRANSPORTATION AND OTHER ACTS IN INTERSTATE COMMERCE CARRIED ON BY MEANS OF MOTOR VEHICLES.

POINT III.

THE MOTOR CARRIER ACT OF 1935 (CHAP. 8, INTERSTATE COMMERCE ACT, TITLE 49, U. S. C. A., §§ 301-327) EXCLUDES FROM ITS OPERATION THE CASUAL, OCCASIONAL OR RECIPROCAL TRANSPORTATION OF PASSENGERS IN INTERSTATE COMMERCE, FOR COMPENSATION, BY ANY PERSON NOT ENGAGED IN TRANSPORTATION BY MOTOR VEHICLES AS A REGULAR OCCUPATION OR BUSINESS.

POINT IV.

IT IS OF UTMOST IMPORTANCE THAT THIS HONORABLE COURT RENDER ITS DECISION UPON THE QUESTION OF THE RIGHT OF THE STATES TO REGULATE MOTOR CARRIER AGENTS OR BROKERS IN THE ABSENCE OF ACTION UPON THE PART OF CONGRESS, AS THE EXISTING CONFLICT IN THE DECISIONS OF THE COURTS OF THE VARIOUS STATES UPON THIS QUESTION SERIOUSLY HAMPERS EFFECTIVE REGULATION OF THIS BUSINESS, WHICH IS SO BADLY NEEDED FOR THE PROTECTION OF THE PUBLIC.

Point I.

In order to protect the public safety and welfare and prevent fraud upon the public, it is essential that the business of acting as agent or broker for the sale of transportation of persons by means of private passenger motor vehicles operated casually by unlicensed persons be regulated under the exercise of the police power.

The advent of good roads, coupled with the popularity of transportation over long distances by motor vehicle, has given rise to a new occupation, that of soliciting and arranging for the transportation of persons by means of private motor vehicles owned by individuals who operate

as carriers of passengers, not as a business but more or less casually and apparently only incidentally to some other occupation, and in many instances, as in the case at bar (R. 5), in order to minimize expenses in making a trip to some distant city. The owners or operators of these private passenger vehicles are without supervision of any kind such as is usually exercised over common carriers or private carriers *engaged in the business* of transporting persons or property. Due to the public's extensive patronage of this new mode of transportation a condition has been created which is highly detrimental to the public safety and general welfare, and this condition is one which directly affects a large portion of the traveling public. This condition, so inimical to the public welfare, results from the fact that the owners or operators of the vehicles are often, if not usually, financially irresponsible and their vehicles unsafe. Far too often persons pay for transportation to destinations to which the owners of these vehicles have no intention of transporting them. Passengers are left stranded along the route, either because of mechanical failure of the vehicle and lack of funds on the part of the owner to have repairs made, or by reason of outright fraud on his part. This loss falls upon a class of people who can ill afford to bear it. They seek this means of travel because of its economy. When these unfortunate people suffer loss or accident they have no practical means of recourse against the driver of the car for he is either without financial responsibility or has disappeared. While the operators of these vehicles may come and go, the broker or transportation agent who has brought the operator and the passenger together is conducting a permanent business at a fixed location and may readily be found. In other words, the broker is the only one who affords a practical means of relief to passengers who have suffered loss or accident.

Accordingly, in several of the States besides California

laws have been enacted for the protection of the public by requiring those in the business of securing passengers for private individuals to transport by means of motor vehicle to secure a license from the State upon payment of a more or less nominal fee and to post a bond in a substantial sum conditioned upon the faithful performance of the contract of carriage which has been entered into through their efforts.

It is respectfully submitted that legislation of this type is reasonable and necessary for the protection of the public and is a proper subject for the valid exercise of the police power.

The question then arises whether this particular power is to be exercised exclusively by the Federal government in its relation to the subject of interstate commerce and its effect thereon.

Point II.

The decision of the court below, holding that even in the absence of legislation by Congress upon the subject the States are without power to regulate motor carrier agents or brokers in so far as their acts relate to selling or arranging for transportation to destinations beyond the State, is in conflict with decisions of this Court applicable to the regulation of transportation and other acts in interstate commerce carried on by means of motor vehicles.

There seems to be no serious contention that the several States have not the power to enact this type of legislation with reference to intrastate operations.

People v. *Henry*, 131 Cal. App. 82, 95, 21 Pac. (2d) 672, 677;

People v. *Stelling*, 131 Cal. App. 300, 303, 21 Pac. (2d) 167, 168;

In re Marriott, 218 Cal. 179, 182, 22 Pac. (2d) 692, 694.

However, there is a division of judicial opinion upon the question of the power of the States to make such legislation applicable to interstate operations. Those courts which uphold the right of the States to regulate interstate operations by this type of legislation argue that it is not a direct burden upon interstate commerce and in support of their conclusion cite the decisions of this court in *Bradley* v. *Public Utilities Commission*, 289 U. S. 92, 77 L. Ed. 1053, and *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 76 L. Ed. 1155, which were rendered subsequent to the case of *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 71 L. Ed. 524, decided by this Honorable Court in 1927.

In the following cases it is held that the States may regulate the business of motor carrier brokers or transportation agents, even as to transactions in interstate commerce:

Francis v. *Allen* (1939), 54 Ariz. 377, 386, 96 Pac. (2d) 277, 281;

Bowen v. *Hannah* (1934), 167 Tenn. 451, 463, 71 S. W. (2d) 672, 676;

Martin v. *Railroad Commission* (1936, Tex. Civ. App.), 93 S. W. (2d) 1155, 1157, 1159.

Decisions to the contrary, in addition to the case at bar in the court below, are:

Ex Parte Talkington (1937), 132 Tex. Cr. R. 361, 104 S. W. (2d) 495;

Ex Parte Martin (1934), 127 Tex. Cr. R. 25, 74 S. W. (2d) 1017.

1. *Di Santo* v. *Pennsylvania* *Distinguished*

In *Di Santo* v. *Pennsylvania* (*supra*), 273 U. S. 34, 71 L. Ed. 524, this Honorable Court held that a State statute

which required steamship agents to secure a license and post a faithful performance bond with the State officials was void in so far as it applied to foreign commerce because of the fact that it constituted a direct burden upon such commerce.

Consideration of that case discloses that the Pennsylvania statute already provided for some procedure for the issuance of certificates of authorization for steamship agents to act and that the statute under attack was administered by the banking commissioner and apparently was aimed at some evil arising out of acts in the nature of the banking business carried on by steamship agents. The agent in the *Di Santo* case does not appear to have been acting as a broker for whoever had transportation to offer, but was the authorized representative of four steamship companies. It does not appear that he sold transportation for any other company. He was in every sense of the word a direct agent of the four companies which he represented, and was not an intermediary through which any person having casual transportation to sell might contact persons wishing to make a trip. This is a distinction recognized by the Interstate Commerce Commission. (*Cain Broker Application* (1937), 2 M. C. C. 633, 635.)

The motor carrier transportation agent conducting what amounts to a brokerage business is not to be compared with the steamship agent in the *Di Santo* case. The motor carrier transportation agent is more like a real estate broker or a stock broker who acts as an intermediary between persons desiring to sell and persons willing to buy.

Mr. Justice Brandeis, Mr. Justice Holmes and Mr. Justice Stone dissented from the opinion of the majority of the Court in the *Di Santo* case, which was delivered by Mr. Justice Butler. In Mr. Justice Brandeis' dissenting opinion, concurred in by Mr. Justice Holmes, it was pointed out that the Pennsylvania statute was a police measure

enacted for the evident purpose of preventing a species of fraud found to be practiced in that State. That the statute, though it related to the sale of steamship tickets, regulated an intrastate transaction, and that it did not obstruct or discriminate against foreign commerce nor place any *direct* burden upon such commerce but only affecte it indirectly.

In a separate dissenting opinion, also concurred in by Mr. Justice Holmes and Mr. Justice Brandeis, Mr. Justice Stone pointed out that the purpose of the commerce clause of the Constitution was not to preclude all State regulation of commerce crossing State lines but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign, and that the recognition of the power of the States to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to State regulation, and which, because of their local character as well as their number and diversity, can never be adequately dealt with by Congress, and that such regulation, so long as it does not impede the free flow of commerce, may properly be and for the most part has been left to the States by the decisions of this Honorable Court.

Mr. Justice Stone also stated in his dissenting opinion that to his mind the traditional test of the limit of State action by inquiring whether its interference with commerce is direct or indirect is too mechanical, too uncertain in its application, and too remote from actualities to be of value; that interference with interstate commerce by State regulation is to be sustained not because the effect on commerce is nominally indirect but because a consideration of all of the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved, and the actual effect on the flow of commerce lead to the conclusion that the regulation concerns interests

peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across State lines.

It is respectfully submitted that the principles enunciated in the dissenting opinions in the *Di Santo* case have been adopted and approved by this Honorable Court in its subsequent decisions, commencing with *Continental Baking Co.* v. *Woodring* (*supra*), 286 U. S. 352, 76 L. Ed. 1155.

2. *Decisions Subsequent to Di Santo* v. *Pennsylvania.*

a. *Continental Baking Co.* v. *Woodring.*

In *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 76 L. Ed. 1155, this Court held that the States had the right to enact statutes requiring motor carriers, as a condition of obtaining a license to operate upon the highways of the State, to file a liability insurance policy in a reasonable sum as may be deemed adequate to protect the interests of the public against loss or damage to property resulting from the negligent operation of the motor carrier, on the ground that reasonable regulations to that end are valid as to intrastate traffic and where there is no discrimination against the interstate commerce which may be affected they do not impose an unconstitutional burden upon that commerce.

b. *Bradley* v. *Public Utilities Commission.*

In *Bradley* v. *Public Utilities Commission* (*supra*), 289 U. S. 92, 77 L. Ed. 1053, this Court upheld the right of the States to regulate the routes over which motor carriers might travel even though they be engaged in the interstate transportation of property. It was pointed out in the opinion delivered by Mr. Justice Brandeis that protection against accident, as against crime, presents ordinarily a local problem; that regulation to insure safety is an exercise of the police power, and that in the absence of action by Congress on the subject the States are free to legislate in that regard, even though motor cars used exclusively in interstate commerce are affected thereby.

c. *H. P. Welch Co.* v. *New Hampshire.*

In *H. P. Welch Co.* v. *New Hampshire,* 306 U. S. 79, 83 L. Ed. 500, this Court upheld the validity of a State statute which prohibited the operation of motor vehicles engaged in the transportation of property when the driver has been continuously on duty for more than twelve hours or has not had a rest of eight consecutive hours between twelve-hour shifts, and held such statute applicable to motor vehicles operated in interstate transportation.

In the opinion delivered by Mr. Justice Butler, it was pointed out that, in view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any State safety measure prior to taking effect of a Federal measure found suitable to put in its place, and that the purpose of a Federal statute to displace the local law must be definitely expressed, and that Congress in enacting the Federal Motor Carrier Act of 1935 did not intend in its grant of power to the Interstate Commerce Commission to supersede State police regulations established for the protection of the public using State highways.

d. *Eichholz* v. *Public Service Commission.*

In *Eichholz* v. *Public Service Commission,* 306 U. S. 268, 83 L. Ed. 641, it was held that the State of Missouri had the right to require all freight motor carriers to secure certificates of public convenience and necessity for the reason that while Congress could regulate interstate transportation of the sort involved in that case, yet in the absence of the exercise of Federal authority and in the light of local exigencies the State is free to act in order to protect its legitimate interests, even though interstate commerce is *directly* affected.

e. *Ziffrin* v. *Reeves.*

In *Ziffrin* v. *Reeves,* 308 U. S. 132, 84 L. Ed. 128, this Court upheld a Kentucky statute regulating and prohibiting, except in a certain manner, the transportation of intoxicating liquor, and ruled that such statute is validly applicable to transportation by motor carrier beyond the limits of the State.

f. *Maurer* v. *Hamilton.*

In *Maurer* v. *Hamilton,* 309 U. S. 598, 84 L. Ed. 969, this Court, in an opinion delivered by Mr. Justice Stone, upheld the validity of a Pennsylvania statute, as applied to interstate transportation, which prohibited the operation of motor vehicles carrying any other vehicle above the cab of the carrier vehicle, it being pointed out that the subject-matter was not covered by the Motor Carrier Act of 1935 and that as a matter of statutory construction Congressional intention to displace local laws in the exercise of its commerce power is not in general to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose, and that this is especially the case when public safety and health are concerned.

g. *Hartford Accident and Indemnity Company* v. *Illinois.*

Attention is respectfully called to the case of *Hartford Accident and Indemnity Co.* v. *Illinois,* 298 U. S. 155, 80 L. Ed. 1099. That case, while not directly involving the transportation of persons or property by motor carrier, yet involved a question identical in principle with that presented in the case at bar. In that case an Illinois statute required produce commission merchants to give faithful performance bonds for the protection of consignors and to secure a license upon application disclosing the fitness of such persons to engage in the business. This Court held that the statute does not, as applied to commission mer-

chants handling produce shipped to them from points outside the State, unconstitutionally burden interstate commerce. In upholding the validity of the statute, it was pointed out, in the opinion of the Court delivered by Mr. Justice Roberts, that the statute is a police regulation, that the business regulated is local, having its *situs* within the State and being conducted therein, and the fact that the commission merchant handles farm products shipped to him from points without the State is not enough to condemn the regulation of a business carried on within the borders of the State, as whatever effect the regulation has upon interstate commerce is indirect and incidental and within the regulatory power of the State until Congress, under the commerce power, adopts inconsistent legislation.

It is respectfully submitted that a consideration of the foregoing decisions of this Honorable Court leads clearly to the conclusion that under the principles enunciated therein the statute involved in the case at bar is a valid exercise of the police power of the State of California, even as applied to respondent's acts in arranging for transportation to points outside the State.

Point III.

The Motor Carrier Act of 1935 (Chap. 8, Interstate Commerce Act, Title 49, U. S. C. A., §§ 301-327) excludes from its operation the casual, occasional or reciprocal transportation of passengers in interstate commerce, for compensation, by any person not engaged in transportation by motor vehicle as a regular occupation or business.

Chapter 8 of the Interstate Commerce Act, Title 49, U. S. C. A., sections 301 to 327, referred to as the Motor Carrier Act of 1935, expressly declares, in section 303(b), that:

> "* * * unless and to the extent that the commission shall from time to time find that such application is

necessary to carry out the policy of Congress enunciated in section 302 of this chapter, shall the provisions of this chapter, except the provisions of section 304 of this chapter relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: * * * (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business."

While it appears that the Interstate Commerce Commission is given authority to act in the matter of casual, occasional or reciprocal transportation to the extent that the Commission may find necessary in order to carry out the policy of Congress enunciated in section 302 of the Motor Carrier Act, the Interstate Commerce Commission has not as yet assumed to act in the matter and has repeatedly held that brokers acting as intermediaries for persons desiring to furnish casual and occasional motor carrier transportation are not required to be licensed by the Commission, as evidenced by the following decisions of the Commission:

Hale Broker Application (1939), 14 M. C. C. 451, 453;
Michaux Broker Application (1939), 11 M. C. C. 317, 318;
Frank Broker Application (1938), 8 M. C. C. 15, 19.

From the express language of the Motor Carrier Act of 1935 it is apparent that Congress did not command the Interstate Commerce Commission to exercise authority over the type of motor carrier for which respondent acted as intermediary in the sale of transportation by means of such vehicles, except in the matter of the qualifications and maximum hours of service of employees and safety of operation or standards of equipment, and even as to those matters it apparently was not the intent of Congress to

withdraw from the States all legislative power in that regard. (*Maurer* v. *Hamilton* (*supra*), 309 U. S. 598, 84 L. Ed. 969.)

It is therefore respectfully submitted that Congress has not attempted to regulate the casual, occasional or reciprocal transportation of persons by private motor vehicle where the operators thereof are not engaged in such transportation as a business, but at most has left the matter to the discretion of the Interstate Commerce Commission, which body has to date declined to act in the matter, and that therefore whatever regulation such carriers and the brokers acting for them may be subjected to is that found in the regulatory statutes of the several States. (*H. P. Welch Co.* v. *New Hampshire* (*supra*), 306 U. S. 79, 85, 83 L. Ed. 500, 505.)

Point IV.

It is of utmost importance that this honorable Court render its decision upon the question of the right of the States to regulate motor carrier agents or brokers in the absence of action upon the part of Congress, as the existing conflict in the decisions of the courts of the various States upon this question seriously hampers effective regulation of this business, which is so badly needed for the protection of the public.

From what has been said with regard to the evil with which the public is confronted, coupled with the conflict of decision in the State courts upon the question of the power of the States to legislate on the matter, and the refusal of the Interstate Commerce Commission to act based upon its interpretation of the Motor Carrier Act of 1935, it is apparent that it is of utmost importance that this Honorable Court grant the petition for a writ of certiorari in the case at bar in order that a decision may be rendered by the

highest court in the land finally and authoritatively determining the question and thereby eliminate the present uncertainty as to whether power resides in the States to legislate upon the subject of private individuals rendering casual transportation in their private passenger vehicles between points in different States, and the business of those who act as intermediaries or brokers in obtaining passengers for such persons.

Conclusion.

In conclusion, it is respectfully submitted that in this case a writ of certiorari should be granted in order that this Court may review the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, and reverse such judgment.

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SUPREME COURT OF THE UNITED STATES.

No. 687.—October Term, 1940.

The People of the State of California, Petitioner, vs. E. W. Thompson.	On Writ of Certiorari to the Appellate Department of the Superior Court, Los Angeles County, State of California.

[April 28, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

A statute of California, Ch. 390, Statutes of 1923, p. 1011, as amended by Ch. 665, Statutes of 1935, p. 1833, defines a transportation agent as one who "sells or offers to sell or negotiate for" transportation over the public highways of the state, § 2, and requires every such agent to procure a license from the State Railroad Commission authorizing him so to act. By §§ 6, 7 and 8, prerequisites to the license are determination by the Commission of the applicant's fitness to exercise the licensed privilege, the payment of a license fee of $1.00, and the filing by the applicant of a bond in the sum of $1,000, conditioned upon the faithful performance of the transportation contracts which he negotiates. By § 16 any person acting as a transportation agent without a license is guilty of a misdemeanor. The question for decision is whether the statutory exaction of the license and bond infringes the Commerce Clause of the Constitution when applied to one who negotiates for the transportation interstate of passengers over the public highways of the state.

Respondent was convicted of violation of the statute by arranging for the transportation by motor vehicle, of passengers from Los Angeles, California, to Dallas, Texas, by one who, so far as appears, made only the single trip in question. The state appellate court reversed the judgment of conviction, holding on the authority of *DiSanto* v. *Pennsylvania*, 273 U. S. 34, that the statute as applied infringes the Commerce Clause. We granted certiorari February 17, 1941, the question, considered in the light

of our decisions since the *DiSanto* case, sustaining state regulations affecting interstate transportation by motor vehicle, being of importance.

Congress has not undertaken to regulate the acts for which respondent was convicted or the interstate transportation to which they related. The Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. §§ 301-327, which applies to certain classes of common and contract interstate carriers by motor vehicle, excludes from its operation the casual or occasional transportation by motor vehicle of passengers in interstate commerce by persons not engaged in such transportation as a regular occupation or business, § 303(b)(9). Hence we are concerned here only with the constitutional authority of the state to regulate those who, within the state, aid or participate in a form of interstate commerce over which Congress has not undertaken to exercise its regulatory power.

The statute is not a revenue measure. Cf. *Texas Transportation Co.* v. *New Orleans*, 264 U. S. 150. It applies alike to transportation agents who negotiate for transportation intrastate as well as interstate and so does not discriminate against interstate commerce. Cf. *Real Silk Mills* v. *Portland*, 268 U. S. 325. It does not appear that the regulation will operate to increase the cost of the transportation or in respects not already indicated affect interstate commerce. It is not shown to be other than what on its face it appears to be, a measure to safeguard the members of the public desiring to secure transportation by motor vehicle, who are peculiarly unable to protect themselves from fraud and overreaching of those engaged in a business notoriously subject to those abuses.

As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. Ever since *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local

character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in *DiSanto* v. *Pennsylvania, supra,* 40.

A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith* v. *Alabama,* 124 U. S. 465; *Chattanooga & St. Louis Railroad* v. *Alabama,* 128 U. S. 96. It may define the size of crews manning interstate trains. *Chicago, R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453; *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, and prescribe regulations for payment of their wages. *Erie R. Co.* v. *Williams,* 233 U. S. 685. It may require interstate passenger cars to be heated and guard posts to be placed on bridges of an interstate railroad. *New York, New Haven & Hartford R. R. Co.* v. *New York,* 165 U. S. 628. It may limit the speed of interstate trains within city limits. *Erb* v. *Morasch,* 177 U. S. 584. It may require an interstate railroad to eliminate grade crossings. *Erie R. R. Co.* v. *Commissioners,* 254 U. S. 394, 409, 412. It may pass local quarantine laws applicable to merchandise moving in interstate commerce as a means of protecting local health. *Morgans, etc. S. S. Co.* v. *Louisiana,* 118 U S. 455; *Compagnie Francaise* v. *Board of Health,* 186 U. S. 380. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. *Wilson* v. *Blackbird Creek Marsh Co., supra; see Clyde Mallory Lines,* 296 U. S. 261, 267. It may regulate pilots and pilotage in its harbors. *Cooley* v. *Board of Port Wardens, supra.* Where, as here, Congress has not entered the field, a state may pass inspection laws and regulations applicable to articles of interstate commerce designed to safeguard the inhabitants of the state from fraud, provided only that the regulation neither discriminates against nor substantially obstructs the commerce. *Turner* v. *Maryland,* 107 U. S. 38; *Plumley* v. *Massachusetts,* 155 U. S. 461; *Patapsco*

Guana Co. v. *North Carolina,* 171 U. S. 345, 357, 358; *Savage* v. *Jones,* 225 U. S. 501; see also *Minnesota Rate Cases,* 230 U. S. 352, 398-412 and cases cited; *South Carolina Highway Dept.* v. *Barnwell Bros,* 303 U. S. 177, 185-191 and cases cited.

The present case is not one of prohibiting interstate commerce or licensing it on conditions which restrict or obstruct it. Cf. *Crutcher* v. *Kentucky,* 141 U. S. 47; *Walker Co.* v. *Bondurant,* 257 U. S. 282. For here the regulation is applied to one who is not himself engaged in the transportation but who acts only as broker or intermediary in negotiating a transportation contract between the passengers and the carrier. The license required of those engaged in such business is not conditioned upon any control or restriction of the movement of the traffic interstate but only on the good character and responsibility of those engaged locally as transportation brokers.

Fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation. In every practical sense regulation of such conduct is beyond the effective reach of Congressional action. Unless some measure of local control is permissible, it must go largely unregulated. In any case until Congress undertakes its regulation we can find no adequate basis for saying that the Constitution, interpreted as a working instrument of government, has foreclosed regulation, such as the present, by local authority.

In *DiSanto* v. *Pennsylvania,* this Court took a different view. Following what it conceived to be the reasoning of *McCall* v. *California,* 136 U. S. 104, it held that a Pennsylvania statute requiring others than railroad or steamship companies, who engage in the intrastate sale of steamship tickets or of orders for transportation to and from foreign countries, to procure a license by giving proof of good moral character and filing a bond as security against fraud and misrepresentation to purchasers, was an infringement of the Commerce Clause. Since the decision in that case this Court has been repeatedly called upon to examine the constitutionality of numerous local regulations affecting interstate motor vehicle traffic. It has uniformly held that in the absence of pertinent Congressional legislation there is constitutional power in the states to regulate interstate commerce by motor vehicle wherever it affects the safety of the public or the safety and con-